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LIABILITY FOR CONSTRUCTION DEFECTS IN RESIDENTIAL REALTY: A RE-EXAMINATION IN LIGHT OF *KENNEDY v. COLUMBIA LUMBER & MANUFACTURING CO.*

I. INTRODUCTION

Liability for construction defects in new homes has been a recurring topic in litigation nationwide in the past ten to twenty years. South Carolina courts increasingly have had opportunities to develop this area of law. *Kennedy v. Columbia Lumber & Manufacturing Co.*[1] represents the latest in a series of modern construction defect cases dating from *Rutledge v. Dodenhoff*[2] in 1970.

South Carolina courts have followed a national trend toward consumer protection in sales of new residential realty and have expanded the remedies available to home purchasers for physical defects. The culmination of this trend is the recognition of implied warranties that survive transfer of the deed to the purchaser. Specifically, the implied warranty of habitability and the implied warranty of workmanlike service represent a shift from *caveat emptor* to *caveat venditor*; this places the sale of a home on roughly equal footing with the sale of a chattel under the Uniform Commercial Code and strict liability principles.[3] This expansion of remedies is shadowed by an increase in the number of potential defendants in physical-defect suits including lenders and builders not involved in the initial sale.

This trend is not, however, without limits. Courts often distinguish certain potential defendants and limit liability based on the role each plays. Aside from the purchaser, the primary actors are the developer, builder, and lender. This Note reviews the potential liability of these parties in light of *Kennedy*.

Prior to *Rutledge* and its progeny, the purchaser of a defective home in South Carolina had very few remedies. South Carolina common law distinguished the sale of chattels from the sale of realty.[4] The

1. 299 S.C. 335, 384 S.E.2d 730 (1989).
2. 254 S.C. 407, 175 S.E.2d 792 (1970).
3. *See* Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976).
4. *See Rutledge*, 254 S.C. at 412, 175 S.E.2d at 795; *see also* Hubbard & Felix, *Liabilities of Sellers and Lessors of Residential Realty in South Carolina*, 40 S.C.L. REV.

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law concerning chattels followed a philosophy that a sound price warrants a sound commodity. Thus, *caveat venditor*, or seller beware, was the general rule in the sale of personalty. The Uniform Commercial Code and products liability law have bolstered this principle. In contrast, the law concerning realty provided the purchaser with few remedies. Courts did not recognize implied warranties. The doctrines of merger by deed[5] and privity[6] also worked to limit a purchaser's recovery. In fact, purchasers of completed homes could obtain remedies only through expressly reserved warranties or for fraud. This philosophy toward realty was based on a determination that "a buyer deserved whatever he got if he relied on his own inspection of the merchandise and did not extract an express warranty from the seller."[7] Apparently this common-law view rarely worked a hardship on the typical home buyer prior to World War I. Most home buyers purchased an empty lot and then contracted with an architect and a contractor to design and build the home. If problems arose, the buyer had the option to recover against these parties, with whom he was in privity. The doctrine of *caveat emptor*, or buyer beware, "applied to the relatively rare purchase of a new home already built."[8]

The advent of speculative (spec) housing after World War II[9] dramatically increased the application of the doctrine of *caveat emptor* and subsequently led to its downfall. In an attempt to protect home buyers, courts increasingly rejected limitations on liability and found implied warranties in the sale of new residential housing.[10] The theory behind this shift is that the sale of a home—whether speculatively or contractually built—is in essence the sale of a product. Recognizing this similarity, there is "little reason to apply ancient doctrines of real property law which are inconsistent with the current and historical treatment of sales of personalty in this State."[11] Courts, in the name of consumer protection, have therefore replaced *caveat emptor* with *ca-*

545, 547 (1989). Note, *Implied Warranties in New Home Sales—Is the Seller Defenseless?*, 35 S.C.L. REV. 469 (1984).

5. *See Lane*, 267 S.C. at 500, 229 S.E.2d at 729.

6. *See* Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980).

7. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 342, 384 S.E.2d 730, 735 (quoting Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 836-37 (1967)).

8. *Id.*

9. The increased need for new housing after the war spawned a "new breed of superdeveloper" who built largely on speculation. *Id.* at 343, 384 S.E.2d at 735. The "spec" builder purchases a vacant lot from a developer and constructs a home on it. The completed home is then sold. The builder's risk is that the home will not sell quickly or will not yield a profit.

10. *See infra* text accompanying note 67.

11. Lane v. Trenholm Bldg. Co., 267 S.C. 497, 501, 229 S.E.2d 728, 730 (1976).

veat venditor in residential real estate transactions.

In most transactions, a disgruntled buyer is likely to look to the most visible parties for liability. A disappointed home buyer typically will look first to the builder or seller. In analyzing the potential liability of these parties, this Note will examine builder liability separately from seller liability. In the event a builder-vendor is judgment-proof, since many are thinly capitalized and bankruptcy is not uncommon, a purchaser may look to a lender for liability. This is increasingly the case with construction lenders.

II. FRAUD AND MISREPRESENTATION

A. Builder-Vendor

Because builders and sellers tend to be involved directly in the sale of a new home, they must be extremely cautious to avoid claims of fraud and misrepresentation. Potential liability of builders and sellers for fraud predates the modern purchaser-protection movement.[12] In fact, the cause of action for fraud[13] and misrepresentation has resulted in liability for a number of sellers in real estate transactions. A few of these cases demonstrate the importance of the "falsity" and "reliance" elements in the test.[14]

In *Cohen v. Blessing*[15] a purchaser sued the vendor, an owner-occupant, for the sale of a home allegedly infested with insects. The South Carolina Supreme Court reversed a demurrer on the fraud count and recognized that:

> [W]hen there exists in the property which is the subject of a sale latent defects or hidden conditions not discoverable on a reasonable examination of the property, the seller, if he has knowledge thereof, is bound to disclose such latent defects or conditions to the buyer, and

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12. *See* Frasher v. Cofer, 251 S.C. 112, 160 S.E.2d 560 (1968).

13. South Carolina courts follow a nine element test for fraud.

> These elements are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate damages.

May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986). The plaintiff must prove each of these elements by "clear, cogent, and convincing" evidence. Griggs v. Griggs, 199 S.C. 295, 301, 19 S.E.2d 477, 479 (1942).

14. For a more complete discussion on the cause of action for fraud and misrepresentation and its elements, see Hubbard & Felix, *supra* note 4, at 549-60.

15. 259 S.C. 400, 192 S.E.2d 204 (1972).

his failure to do so may be made the basis of a charge of fraud.[16]

Thus, a party commits actual fraud when he conceals a material fact within his own knowledge, which it is his duty to disclose.[17] The South Carolina Supreme Court previously had elaborated on this issue in *Lawson v. Citizens & Southern National Bank*.[18] In *Lawson* the purchaser sued the vendor after learning that the lot he purchased was unsuitable for building. Unfortunately for the purchaser, this revelation came after he had built a home on the site.[19] The subsequent settling of the house resulted in the purchaser's successful lawsuit. The court stated that when a duty of disclosure exists, *suppressio veri* (suppression of the truth) is as much fraud as is *suggestio falsi* (suggestion of falsehood).[20]

In *Pruitt v. Morrow*,[21] a strikingly similar case, the court expanded *Lawson* to include negligent or reckless nondisclosure. The *Pruitt* court held that "the doctrine of *caveat emptor* is also inapplicable in actions based upon negligent or reckless non-disclosure of land defects."[22] In *May v. Hopkinson*,[23] a case involving the concealment and nondisclosure of moisture and termite damage, the South Carolina Court of Appeals found that buyers have a right to rely on the seller to disclose latent defects of which the seller has knowledge.[24] A buyer cannot rely on the seller's duty to disclose, however, if the buyer has acted recklessly or has been grossly negligent.[25]

Fraud is an important source of potential liability for builders and sellers of new homes. Although the buyer has a duty to reasonably inspect the property prior to purchase, the seller must inform the buyer of latent defects of which the seller is aware. This duty of disclosure is based on the seller's knowledge that a defect is not discoverable by reasonable inspection.[26] The seller additionally may not make any false

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16. *Id.* at 403, 192 S.E.2d at 205 (quoting 37 AM. JUR. 2D *Fraud and Deceit* § 158 (1968)).

17. *See* Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 436, 23 S.E.2d 372, 376 (1942).

18. 259 S.C. 477, 193 S.E.2d 124 (1972).

19. When the home began to settle, the purchaser discovered he had built the home over a stump-filled gulley capped with clay. *Id.* at 479-80, 193 S.E.2d at 125.

20. *Id.* at 485, 193 S.E.2d at 128.

21. 283 S.C. 298, 342 S.E.2d 400 (1986).

22. *Id.* at 301, 342 S.E.2d at 401.

23. 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986).

24. *Id.* at 557, 347 S.E.2d at 513.

25. J.B. Colt Co. v. Britt, 129 S.C. 226, 234-35, 123 S.E. 845, 848 (1924); *see* Hubbard & Felix, *supra* note 4, at 557-58.

26. *See* Hubbard & Felix, *supra* note 4, at 560 n.68. The standard for the legitimacy of a buyer's reliance is gross negligence or recklessness. *Id.* Although presumably a seller may be held to a standard of good faith or due diligence to discover latent defects,

representations or conceal any defects. By exercising caution in these matters, builders and sellers can protect themselves from charges of fraud.

B. Lender

The principles that apply to builders and sellers may apply to lenders, especially if they are directly involved in the sale. The *Kennedy* court stated that "[a] lender should be held responsible if it is aware of defects but conceals them from an unwitting buyer."[27] Proper disclosures should be made and lenders should use caution in making express representations of a property's condition to potential purchasers. Although lender site inspections are typically found to be for the lender's benefit and not for the buyer,[28] *Kennedy* suggests that a lender should disclose to the buyer any defects that it discovers.

III. NEGLIGENCE

A. Builder-Vendor

The application of negligence principles to builders and vendors for defects in new, residential housing has yielded unclear and unpredictable results. Although *Kennedy* arguably clarifies the rule, it is helpful to discuss prior case law to document the confusion. The primary focus will be on the builder because the builder is the primary target in a suit for defective construction.

Rogers v. Scyphers[29] concerned a negligence action for personal injuries sustained as a result of allegedly defective construction. The plaintiff, the purchaser's wife, was injured after falling from a defective attic staircase. The builder, who was also the vendor of the new home, unsuccessfully moved for demurrer. The South Carolina Supreme Court held that a builder whose defective construction causes personal injury to the buyer can be liable in tort for negligent failure to discover or disclose latent defects.[30] The duty imposed is one of reasonable disclosure.[31] The court cited *MacPherson v. Buick Motor Co.*[32] and dis-

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no South Carolina case law exists on point.

27. 299 S.C. at 340, 384 S.E.2d at 734.

28. *See infra* text accompanying note 52.

29. 251 S.C. 128, 161 S.E.2d 81 (1968).

30. *Id.* at 133, 161 S.E.2d at 83; *see also* Hubbard & Felix, *supra* note 4, at 561.

31. *Rogers*, 251 S.C. at 133, 161 S.E.2d at 83. The court adopted the *Restatement* rule:

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition . . . which involves unreasonable risk to persons on the land, is subject to

missed a privity defense by stating that liability extends to those foreseeably harmed by the premises.[33] The court cited various negligence and implied warranty cases in other jurisdictions[34] and applied the same standard of care to a builder as that owed by the manufacturer of a chattel.[35] Thus, the purchaser of a new residential home was able to rely on the skill of the builder-vendor, at least when personal injuries were involved.

Beyond this point the law is less settled. The issue, simply stated, is whether a purchaser can recover in negligence for pure economic loss not occasioned upon person or other property. This can be made clear by examining two basic fact patterns.

The first pattern involves a builder-vendor who develops a speculative home that he then sells. Later the first purchaser or a subsequent purchaser discovers defective construction. This is the fact pattern of *Terlinde v. Neely*.[36] In *Terlinde* a subsequent buyer sued the builder-vendor after the home's foundation began to settle.[37] The buyer argued breach of implied warranty and negligent construction. The court focused on foreseeability rather than privity and found that the subsequent purchaser could recover under a negligence theory.

> The plaintiffs, being a member of the class for which the home was constructed, are entitled to a duty of care in construction commensurate with industry standards. In light of the fact that the home was constructed as speculative, the home builder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.[38]

Because the plaintiff's loss was limited to pure economic loss, *Terlinde* appears to support recovery for such damages under a negligence theory.

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liability to the vendee and others . . . if (a) the vendee does not know or have reason to know the condition of the risk involved, and (b) the vendor knows or has reason to know of the condition . . . .

RESTATEMENT (SECOND) OF TORTS § 353 (1965).

32. 217 N.Y. 382, 111 N.E. 1050 (1916).

33. *See Rogers*, 251 S.C. at 132-33, 161 S.E.2d at 83.

34. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (builder-vendor may be held negligent when product is defective and causes injury to a user).

35. *Rogers*, 251 S.C. at 134, 161 S.E.2d at 84.

36. 275 S.C. 395, 271 S.E.2d 768 (1980).

37. The builder-vendor had obtained a release from the first purchaser. Additional settlement occurred, however, after the second purchaser occupied the home. *Id.* at 396, 271 S.E.2d at 768.

38. *Id.* at 399, 271 S.E.2d at 770.

In the second situation, the builder contracts with a developer to build a residence. Later, when the purchaser discovers defects, he sues the builder, who was not also the seller. *Carolina Winds Owners' Association v. Joe Harden Builder, Inc.*[39] illustrates this fact pattern.[40] The *Carolina Winds* court asserted the economic loss rule to deny the plaintiff recovery under a negligence cause of action. The rule states that no tort liability for a product defect exists when the plaintiff cannot claim injury to the person or property. Without these damages, a plaintiff must look to contract for a remedy.[41] Interestingly, the *Carolina Winds* court stated that the *Terlinde* opinion did not suggest that a builder owes an unlimited duty in negligence for defective or inferior construction that diminishes the economic value of a house.[42] The court then summarily distinguished *Terlinde* because in *Terlinde* the builder was also the vendor.[43]

Reconciling these cases is not easy. While the supreme court seemed to focus on policy and the court of appeals on technical legal doctrines, that distinction alone is an insufficient explanation. An attorney seeking to advise a builder was faced with difficult and unanswered questions. Was a builder exempt from negligence liability if damages were only of an economic nature, regardless of whether he was involved in the sale of the house? Did he also have to disassociate himself from the sale to be adequately insulated? In spite of the thorough legal reasoning in *Carolina Winds*, one was left with no adequate answers to these questions.

Apparently the South Carolina Supreme Court also believed in the need for clarity. In *Kennedy* the court addressed *Carolina Winds* and rejected certain portions of that opinion. The *Kennedy* court faced the issue of whether an implied warranty of habitability arises in the sale of a new home by a materialman or mere lender seeking to recoup its losses. Because these facts are not necessary to this particular discussion, they will be reserved until a later time. Suffice it to say that no implied warranty of habitability arose in the sale by the materialman. Having decided the issue reserved on appeal, the court turned to a discussion of *Carolina Winds*. Although *Kennedy* examines both the implied warranty and negligence aspects of *Carolina Winds*, the present discussion is concerned only with the latter.

The court began by stating:

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39. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988) (*Carolina Winds* was overruled by Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730 (1989)).

40. In *Carolina Winds* a crack in an exterior facial wall of a condominium building gave rise to the complaint.

41. *Carolina Winds*, 297 S.C. at 82-83, 374 S.E.2d at 902-03.

42. *Id.* at 83, 374 S.E.2d at 903.

43. *Id.*

> While the Court of Appeals' reasoning in *Carolina Winds* appears to be a seamless web of proper legal analysis, the opinion reaches a result which is repugnant to the South Carolina policy of protecting the new home buyer. The result is that a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions.[44]

Adding that it would be "intolerable to allow builders to place defective and inferior construction into the stream of commerce,"[45] the court expanded prior law to increase the level of consumer protection.

The *Kennedy* court altered the *Carolina Winds* framework for negligence as follows:

> The framework we adopt focuses on activity, not consequence. If a builder performs construction in such a way that he violates a contractual duty *only*, then his liability is only contractual. If he acts in such a way as to violate a legal duty, however, his liability is both in contract and in tort. . . . We disagree with *Carolina Winds* insofar as it implies that no legal duties are owed a purchaser by a builder to protect against diminution in the expected value of the building.[46]

Kennedy allows an action in negligence to lie against a builder who has violated a legal duty, regardless of the damage. A builder, therefore, is at risk if he violates an applicable building code, deviates from industry standards, or constructs housing "that he knows or should know will pose serious risks of physical harm."[47] The economic loss rule will continue to apply only when duties are created solely by contract.[48] These principles apply regardless of whether the builder is also the vendor.

Although builder liability for negligence appears to have been clarified, it is important to note that the *Kennedy* court had already addressed the sole issue on appeal prior to its negligence discussion. Such dicta in a unanimous opinion, however, should prove a reliable guide to those concerned with the issue.

B. Lender

Lenders may also find themselves exposed to negligence liability in new home transactions. In *Connor v. Great Western Savings & Loan*

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44. *Kennedy*, 299 S.C. at 341-42, 384 S.E.2d at 734-35.
45. *Id.* at 344, 384 S.E.2d at 736.
46. *Id.* at 345-46, 384 S.E.2d at 737 (emphasis in original).
47. *Id.* at 347, 384 S.E.2d at 738.
48. *Id.*, 384 S.E.2d at 737 (the example given by the court is a buyer who contracted for blue paint but instead received brown).

Association[49] the California Supreme Court held that a construction lender had a duty to home buyers to exercise reasonable care to protect them from damages caused by major structural defects. The court conditioned Great Western's liability on its participation in the residential development. The court pointed to a number of factors that influenced the decision. First, the land was purchased under a "land warehousing" arrangement. This arrangement allowed the lender to retain title and possession rights until the developer was ready to build. Additionally, the lender received substantial fees for making the construction loans and for warehousing the land. Great Western in effect had a right of first refusal to make long-term mortgage loans to purchasers and exercised control over some of the sales and selling prices. Finally, the court noted the lender's knowledge of the developer's thin capitalization and found that the financing "took on ramifications beyond the domain of the usual money lender."[50]

The wisdom of this decision is debatable. A compelling argument aired by the dissent is that "the imposition of a duty implies significant control over the agency of harm. . . . No authority holds that lender-borrower is the type of relationship contemplating the duty of control over the conduct of another so as to prevent injury to third parties."[51] Although many purchasers have claimed that a lender's site inspection imposes a duty on the lender to the purchaser, courts have been reluctant to hold this.[52] Courts typically respond that supervisory provisions in a loan agreement exist only for the protection of the lender.

Apparently the California legislature also disagreed with *Great Western*. The California legislature approved legislation specifying the very limited circumstances in which a lender could be held liable.[53]

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49. 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

50. *Id.* at 864, 447 P.2d at 616, 73 Cal. Rptr. at 376. For a more thorough examination of *Great Western*, see Pfeiler, *Construction Lending and Products Liability*, 25 BUS. LAW. 1309 (1970).

51. *Connor*, 69 Cal. 2d at 874, 447 P.2d at 622, 73 Cal. Rptr. at 382 (Mosk, J., dissenting).

52. *See* Henry v. First Fed. Sav. & Loan Ass'n, 313 Pa. Super. 128, 459 A.2d 772 (1983)(ordinarily the law does not impose a duty on the mortgagee-lender to inspect the mortgaged property for the benefit of the mortgagor-borrower); Armetta v. Clevetrust Realty Investors, 359 So. 2d 540 (Fla. Dist. Ct. App.)(a lender owes no duty to others to supervise the construction and development of prospects it has financed), *cert. denied*, 366 So. 2d 879 (Fla. 1978). A lender's inspection is not done because of quality control, but to ensure work has progressed to an extent necessary to release more funds.

53. CAL. CIV. CODE § 3434 (West 1969):

> A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification or improvement of real or personal property for sale or lease to

This statute restricts the holding of *Great Western*. It has been interpreted to limit lender liability for construction defects to loss or damage that directly or proximately results from the lender's nonlending activities and from lender misrepresentations.[54]

Great Western also appears to be limited by a subsequent California case. In *Bradler v. Craig*[55] an appellate court refused to impose a legal duty on the construction lender to protect a home buyer from construction defects. The lender's approval of plans and specifications for its own protection was irrelevant. The lender was "content to merely loan money at interest on the security of the property; its supervision was for this limited purpose."[56] Thus no per se duty is placed upon a lender to protect the new home purchaser.

To avoid negligence liability, lenders should refrain from nonlender behavior.[57] To the extent this phrase is understandable, a lender presumably can meet its requirements by refusing to exercise direct control over the construction process. Lenders also should avoid entering a joint venture relationship with the developer.[58] As evidenced by the preceding cases, a lender may continue to approve plans and specifications, inspect sites, and engage in other similar behavior designed to protect its interests, without incurring liability for construction defects. Lenders should avoid actions, however, that exceed protection of their interests as lenders. Finally, lenders should carefully screen all developer-borrowers for quality of workmanship and financial stability.

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others, shall not be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified or improved or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification or improvement of such real or personal property, unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to such real or personal property.

54. *See* Pfeiler, *supra* note 50, at 1331.

55. 274 Cal. App. 2d 466, 79 Cal. Rptr. 401 (1969).

56. *Id.* at 476, 79 Cal. Rptr. at 408.

57. *See infra* text accompanying notes 92-98. Joint venture relationships with a developer and "active participation" in a project are examples of nonlender behavior. A lender will be required to exercise due care in any construction it undertakes.

58. *Bradler*, 274 Cal. App. 2d at 474, 79 Cal. Rptr. at 406.

IV. IMPLIED WARRANTIES

A. Caveat Emptor *No Longer Applies*

Implied warranties in real estate transactions are a fairly recent phenomenon. *Caveat emptor* was the standard until the mid-1960's, whether the sale was of raw land or of land and improvements.[59] Although an early-1930's English court found an implied warranty that a home must be built in a workmanlike manner and fit for habitation,[60] it was not until the early-1960's that American courts followed suit. In 1964 the Colorado Supreme Court recognized such a warranty in the sale of newly constructed homes.[61] The court held that the implied warranty doctrine includes agreements between builder-vendors and purchasers in the sale of new homes completed at the time of contracting.[62] The erosion of *caveat emptor* and the rise of *caveat venditor* for the sale of new homes in America thus began.

The South Carolina Supreme Court first recognized implied warranties in the sale of new homes in *Rutledge v. Dodenhoff*.[63] *Rutledge* involved a suit by the purchaser of a new home against the builder-vendor for damages to the house that resulted from the overflow of a septic tank. The plaintiff alleged that the design or installation of the sewage disposal system was defective. The court decided that the doctrine of *caveat emptor* did not apply and held that "in the sale of a new house by the builder-vendor there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation."[64] The court explained that such a warranty is not based on negligence. Due care and fault, therefore, were irrelevant.[65]

Rutledge and its progeny explain the origin of, and the policy behind, the new rule. The *Rutledge* court pointed to "[t]he decided trend of modern decisions to restrict the application of *caveat emptor* and to hold it inapplicable to sales where the vendor is also the builder of a new structure."[66] This promotes the general policy of consumer protection in new home sales. Specifically, the primary justifications include: (1) the focus of the transaction is the sale of a house, not a conveyance

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59. *See supra* text accompanying note 4.

60. *See* Miller v. Cannon Hill Estates, Ltd., 2 K.B. 113 (1931) (such warranties were implied if the home was purchased in the course of construction).

61. *See* Carpenter v. Conahoe, 154 Colo. 78, 388 P.2d 399 (1964).

62. *Id.* at 83, 388 P.2d at 402.

63. 254 S.C. 407, 175 S.E.2d 792 (1970).

64. *Id.* at 414, 175 S.E.2d at 795.

65. *Id.*

66. *Id.* at 413, 175 S.E.2d at 795; *see also* Hubbard & Felix, *supra* note 4, at 570-72.

of land; (2) the inequality in bargaining position between the seller and purchaser; and (3) the need to allow the purchaser to rely on the skill of the builder.

As for the first reason, the court in *Lane v. Trenholm Building Co.*[67] recognized that the essence of the transaction is the sale of a house and not a transfer of a parcel of land. The failure to make this distinction had perpetuated the former rule of *caveat emptor*. A buyer was deemed responsible for a thorough and proper inspection of the premises and could not complain later of defects. By viewing the sale of a house as the sale of a product, the court recognized this distinction.[68]

The court could then treat the sale of a home similarly to the sale of a chattel, with its attendant U.C.C. and strict liability principles. The *Lane* court remarked that "[o]nce the court recognizes the essence of the transaction is the sale of a product with a clearly defined proposed use, there is little reason to apply ancient doctrines of real property law which are inconsistent with the current and historical treatment of sales of personalty in this State."[69] The implied warranties available to new home buyers are consistent with those available to the purchaser of a defective chattel.

An implied warranty theory supports the second justification by attempting to compensate for the disparity between the parties to the transaction. Typically one party is an experienced builder who builds a number of "spec" houses in a given year. He is familiar with proper building procedures, applicable codes, and the benefits and disadvantages of certain materials. In contrast, the other party to the transaction is a buyer who likely will purchase only one or two homes in his lifetime. His expertise obviously is probably limited. The court in *Lane* observed this disparity when it stated, "[t]he law should not orphan the purchaser of a house, who has likely invested his life savings and executed a 20-, 30-, or 40-year mortgage, by the operation of the doctrine of *caveat emptor*."[70] The imposition of implied warranties helps to equalize the positions of the parties in the event the new home is not as sound as it may initially have appeared. It does no more than fulfill the reasonable expectations of the parties.[71]

The desire to compensate the purchaser for an inability to inspect the home for latent defects is closely related to the goal of evening the

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67. 267 S.C. 497, 229 S.E.2d 728 (1976).

68. *Id.* at 501, 229 S.E.2d at 730.

69. *Id.*; *see also Rutledge*, 254 S.C. at 407, 175 S.E.2d at 792 (*caveat emptor* does not apply to the sale of a new home by a builder-vendor).

70. *Lane*, 267 S.C. at 503, 229 S.E.2d at 731.

71. *Id.*

bargaining power between the parties. This problem results not only from the inexperience of the typical buyer, but also from a general difficulty in discovering latent defects. *Rutledge* notes that the expense involved keeps the purchaser from making a knowledgeable inspection. Therefore, "the prospective purchaser . . . is forced to a large extent to rely on the skill of the builder."[72] Such reliance is justifiable because the builder holds himself out as an expert in the construction of the home.[73] This is the third rationale proffered by the *Rutledge* court. Under the prior law of *caveat emptor*, the relying purchaser often had no remedy. By recognizing implied warranties, contemporary courts give comfort to the purchaser who later learns that his reliance was misplaced.

Although *Rutledge* was fairly explicit in its rationale for establishing implied warranties, it was less clear in defining the warranties that it established. For example, the court did not specify whether the warranty arose from the contractual relationship or from the sale itself. Because the builder was involved in the sale, it remained unclear whether the warranty would arise against a builder disassociated from the sale. It also was not clear whether traditional legal doctrines like privity would apply to the warranty. Finally, the *Rutledge* court did not expressly address the question of whether it had implied a single warranty of habitability and workmanlike service, or whether two distinct implied warranties exist.[74] These issues appear to be resolved by subsequent case law.

B. Implied Warranty of Habitability

1. Builder-Vendor

Lane v. Trenholm Building Co. was the first case to address issues unresolved by *Rutledge*.[75] In *Lane* the defendant developer, Trenholm, sold an undeveloped lot to a builder. A home was then built, which Trenholm later acquired in satisfaction of a mortgage when the builder became insolvent. Trenholm sold the home to the plaintiff, who sued Trenholm after discovering construction defects.[76] The court affirmed a jury verdict against the developer, and held that the implied warranty

72. Rutledge v. Dodenhoff, 254 S.C. 407, 414, 175 S.E.2d 792, 795.

73. *Id.*; *see also* Terlinde v. Neely, 275 S.C. 395, 397-98, 271 S.E.2d 768, 769 (1980) (buyer entitled to implied warranty despite lack of personal knowledge of the builders, who held themselves out as experts to prospective buyers).

74. *See* Hubbard & Felix, *supra* note 4, at 564.

75. 267 S.C. 497, 229 S.E.2d 728 (1976).

76. As in *Rutledge*, the defect in *Lane* concerned a septic tank. *Id.*

of habitability "springs from the sale itself."[77] By allowing liability against a vendor who is not also the builder, the court expanded the application of this warranty. It operates regardless of fault. The developer had not built the home and was in no better position than the purchaser to inspect for latent defects. The court's holding was based on the theory that "a sound price warrants a sound commodity."[78]

> Trenholm placed the house in the stream of commerce and exacted a fair price for it. Its liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.[79]

Because Trenholm had sold the house, it was liable for the defects under an implied warranty theory.

Terlinde v. Neely[80] decided another issue unresolved by *Rutledge*. The builder in *Terlinde* was also the vendor. The home began to settle a few years after the first purchaser moved in. This purchaser was able to receive a cash settlement from the seller in return for a release. The home was sold shortly thereafter to a subsequent purchaser, who sued after additional, substantial settlement occurred. The "spec" home was three to four years old at this time. The court again appeared to expand the principle first announced in *Rutledge*. It dismissed the privity argument and held that "an implied warranty for latent defects extends to subsequent home purchasers for a reasonable amount of time."[81]

The court stated that the decision is based on "sound legal and policy considerations,"[82] and pointed to the builder's expertise and to the nature of latent defects. Latent defects, by their very nature, typically do not manifest themselves for a considerable period of time. The purchaser is required to rely upon the construction expertise of the builder. "The fact that the subsequent purchaser did not know the home builder, as did the original purchaser, does not negate the reality of the 'holding out' of the builder's expertise and reliance which occurs in the marketplace."[83]

The remaining implied warranty of habitability cases, all decided since 1986, illustrate the limits of this implied warranty. The first of

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77. *Id.* at 500, 229 S.E.2d at 729.
78. *Id.* at 502, 229 S.E.2d at 730.
79. *Id.* at 503, 229 S.E.2d at 731.
80. 275 S.C. 395, 271 S.E.2d 768 (1980).
81. *Id.* at 399, 271 S.E.2d at 770.
82. *Id.* at 397-98, 271 S.E.2d at 769.
83. *Id.* at 398, 271 S.E.2d at 769.

those cases is *Arvai v. Shaw*.[84] In *Shaw* a builder purchased an unimproved lot and then conveyed it to potential home owners after contracting with them to build a home. The homeowners, dissatisfied with the septic tank system, reconveyed the home to the builder. The house was then sold to a purchaser, who later conveyed it to the plaintiffs. The court refused to find an implied warranty of habitability against the builder.[85]

Because the warranty springs from the sale, the issue is not whether the defendant actually builds the house, "but that he places it, by the initial sale, into the stream of commerce. Holding the custom builder liable under an implied warranty, where he is not also involved in the *sale* of the house, would be incompatible with the law of warranty."[86] An implied warranty of habitability, therefore, is applied only against the seller of a new home.[87]

The South Carolina Court of Appeals reiterated this limitation in *Carolina Winds v. Joe Harden Builder*.[88] In *Carolina Winds* the court of appeals failed to recognize an implied warranty of habitability against a builder not involved in the sale. "Since they [builders] were not parties to the initial sale of the building or the condominium units, we hold they are not liable to the Owners on an implied warranty arising from the sale."[89]

The aforementioned cases led to the most recent pronunciation of the implied warranty of habitability by the South Carolina Supreme Court in *Kennedy v. Columbia Lumber & Manufacturing Co.*[90] In *Kennedy* the court again limited the application of this implied warranty. Like *Rutledge v. Dodenhoff* and similar cases, *Kennedy* involved the sale of a new home. The home was sold not by the builder, but by a materialman who had participated in construction only to the extent of supplying materials. In satisfaction of a mechanic's lien, the materialman took a deed on the substantially completed home in lieu of foreclosure. The materialman then sold the new home to the plaintiff. About eight years after the initial sale of the house, the purchaser sued the materialman because the house had a defective foundation.[91]

Analogizing the materialman to a lender, the court again refused

84. 289 S.C. 161, 345 S.E.2d 715 (1986).

85. *Id.* at 162-63, 345 S.E.2d at 716.

86. *Id.* at 164, 345 S.E.2d at 717 (italics in original). The court found that the builder did not *initially* place the home into the stream of commerce.

87. *See also* Cohen v. Blessing, 259 S.C. 400, 192 S.E.2d 204 (1972) (no implied warranty of fitness when the owner-occupant of a used home sells it).

88. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988) (overruled by *Kennedy*).

89. *Id.* at 80, 374 S.E.2d at 901.

90. 299 S.C. 335, 384 S.E.2d 730 (1989).

91. *Id.* at 338, 384 S.E.2d at 732-33.

to find an implied warranty of habitability. The court held that "a mere lender, even if a party to the sale, is ordinarily not liable under an implied warranty of habitability theory."[92] In reaching this decision, the court compared two cases representing opposing perspectives: *Lane v. Trenholm Building Co.*[93] and *Roundtree Villas Association v. 4701 Kings Corp.*[94] The facts of *Lane*, discussed earlier, are similar to *Kennedy* in that the seller was not the builder, but rather one who sold after taking a deed from the builder in satisfaction of a debt. An important distinction, particularly in the eyes of the court, is that the seller in *Lane* was the subdivision developer. The seller in *Kennedy*, conversely, was "merely a materials supplier."[95]

Roundtree Villas, on the other hand, involved a construction lender who initially monitored a construction project to protect its loan investment. The builder deeded the remaining condominium units to a new selling corporation after he experienced financial problems. The lender then repaired certain defects to facilitate sales by the seller corporation. Although the court ruled that the lender had to exercise due care in regard to the repair work it undertook, it held that the lender was not a party to any sales sufficient to establish liability under an implied warranty of habitability.[96] The *Kennedy* holding extends this protection to most lenders, even if they are minimally involved in the sale.

The *Kennedy* court distinguished *Lane* and expanded the principles of *Roundtree Villas* to insulate the materialman from implied warranty liability. The holding raises some interesting questions. For example, why was the materialman in *Kennedy* a "mere lender" and the developer in *Lane* the source of an implied warranty?

Although the court found that the materialman sold the home only because he took a deed in lieu of foreclosure, both parties sold the houses in an attempt to recoup their losses. The court also stated that "[t]o have held against the buyer [in *Lane*] would have been to frustrate his reasonable expectations when he entered the transaction."[97] Certainly the reasonable expectations of the buyer in *Kennedy* also were frustrated when he discovered the defective foundation. Furthermore, neither defendant actually built the homes involved; one furnished materials and the other furnished the lot. However, the court's distinction is evident in this last characterization. A developer typically

92. *Id.* at 340, 384 S.E.2d at 734.
93. 267 S.C. 497, 229 S.E.2d 728 (1976).
94. 282 S.C. 415, 321 S.E.2d 46 (1984).
95. *Kennedy*, 299 S.C. at 339, 384 S.E.2d at 733.
96. *See Roundtree Villas*, 282 S.C. at 423, 321 S.E.2d at 50-51.
97. *Kennedy*, 299 S.C. at 339, 384 S.E.2d at 733.

does more than merely furnish the lot. He customarily is deeply involved in the process, from purchasing land to establishing a plat for the subdivision.[98] The developer arguably can be viewed as more than a mere lender. Unfortunately, the court chose not to elaborate on this issue but instead summarily distinguished the parties.

This distinction leads, predictably, to a final important question: Why is a mere lender insulated from implied warranty liability when the developer is not? The *Kennedy* court answered this question by stating:

> The public policy reasons for refusing to impose warranty liability are myriad. To require every lender to foreclose in order to shield itself from liability instead of taking a deed in lieu would be unduly burdensome on the state's judicial and administrative machinery. The imposition of warranty liability on all lenders/sellers would discourage lending, and thus, economic growth. Further, it is unduly punitive to impose potential warranty liability on a lender that is searching for some way to recover the losses it has suffered due to the default of the debtor.[99]

The parameters of the implied warranty of habitability thus have been further defined by *Kennedy*. Although the sale of a new home generally will continue to give rise to the warranty, the presence of a mere lender in the sale will limit its application. Builder-vendors, therefore, need to be aware of this potential liability.

2. *Lender*

Lenders can avoid liability so long as they remain "mere lenders" in post-default sales. However, certain actions will take a lender out of this safe harbor. *Kennedy* provides examples of behavior that may result in liability. Lenders must avoid three main traps. First, a lender may be liable under an implied warranty if it develops the home or "is so amalgamated with the developer or builder so as to blur its legal distinction."[100] A finding that the lender and a builder-developer entered into a joint venture will trigger this exception. Such a finding hinges on the intent of the parties.

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98. The developer typically takes a second mortgage on the property he sells to the builder. The lender, on the other hand, takes the first mortgage as security for a construction loan. The developer, therefore, is dependent on the sale of the completed home to realize any benefit from his bargain.

99. *Kennedy*, 299 S.C. at 340, 384 S.E.2d at 734. Although a few remarks about this policy decision will be made in the section on lender liability, a thorough policy debate is beyond the scope of this Note.

100. *Id.*

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> It [a joint venture] must arise from a contractual basis, although the contract need not be express but may be implied . . . . To constitute a joint venture, certain facts are essential: (1) each party . . . must make a contribution . . . ; (2) profits must be shared . . . ; (3) there must be a 'joint proprietary interest and right of mutual control over the subject matter' of the enterprise; [and] (4) usually, there is a single business transaction rather than a general and continuous transaction.[101]

Second, avoiding a joint venture may not necessarily suffice to protect a lender. A lender may also be liable for "active participation" in a home construction project. The premier example of this situation is *Connor v. Great Western Savings & Loan Association*,[102] which is discussed in the negligence section.[103] As previously noted, subsequent case law has tended to limit this liability to lenders whose activities greatly exceed those of a typical lender.[104]

The final exception typically occurs when a lender gains title to a project after a default and completes construction prior to sale. *Roundtree Villas Association v. 4701 Kings Corp.* recognized a lender's duty to use due care in the construction it undertakes.[105] The potential for liability increases correspondingly with a lender's involvement in the marketing and sale of such projects. A Florida appeals court stated the test in that state as follows:

> A lender who forecloses a mortgage on a construction project and becomes the developer of that project is liable to a purchaser of a unit of the project for (a) performance of express representations made to the purchaser by the lender, (b) patent construction defects in the entire project, and (c) breach of any applicable warranties resulting from defects in the portions of the project completed by the lender.[106]

As a whole, these exceptions do not appear to impose unreasonable restrictions on the typical lender's behavior. By acting as a mere lender—one "content to merely loan money at interest on the security of property"[107]—most construction lenders should avoid liability under

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101. Christiansen v. Philcent Corp., 226 Pa. Super. 157, 161-62, 313 A.2d 249, 250-51 (1973); *see also* Central Bank, N.A. v. Baldwin, 94 Nev. 581, 583 P.2d 1087 (1978) (joint venture in which a bank lent money and its subsidiary owned half the stock of the developer).

102. 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

103. *See supra* text accompanying note 49.

104. *See* Bradler v. Craig, 274 Cal. App. 2d 466, 79 Cal. Rptr. 401 (1969); Allison v. Home Sav. Ass'n, 643 S.W.2d 847 (Mo. Ct. App. 1982).

105. Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984).

106. Port Sewall Harbor and Tennis Club Owners Ass'n v. First Fed. Sav. and Loan Ass'n, 463 So. 2d 530, 532 (Fla. Dist. Ct. App. 1985).

107. Bradler v. Craig, 274 Cal. App. 2d 466, 476, 79 Cal. Rptr. 401, 408 (1969).

implied warranty theories.[108]

C. *Implied Warranty of Workmanlike Service*

1. *Builder-Vendor*

As noted in the introduction to this section, the *Rutledge* court left open the issue of whether it established one or two implied warranties. The court simply held that "in the sale of a new house by the builder-vendor there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation."[109] Because South Carolina courts did not decide this issue until *Kennedy*, it may be helpful first to examine the treatment of this implied warranty in other jurisdictions.

Not surprisingly, courts in other jurisdictions introduced the principle of *caveat venditor* in new home sales in language similar to that of *Rutledge*. In *Waggoner v. Midwestern Development, Inc.*[110] the South Dakota Supreme Court held that "where in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed."[111] Whereas South Carolina implied warranty law developed around a warranty of habitability, other jurisdictions developed a separate warranty of workmanlike service. The *Waggoner* court addressed this warranty in a construction defect case and remarked: "As a general rule, it may be said that where a person holds himself out as especially qualified to perform work of a particular character there is an implied warranty that the work shall be done in a reasonably good and workmanlike manner."[112]

Although courts began to speak in terms of an implied warranty of workmanlike service, it remained unclear whether this warranty had an existence separate and distinct from the implied warranty of habitability theory. Courts continued to treat the warranties as Siamese twins; each recognized, but having a singular existence. Opinions continued to speak of the two concepts, yet decisions were typically based on the implied warranty theory.

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108. *See* discussion on implied warranty of workmanlike service, *infra* notes 109-24 and accompanying text.

109. Rutledge v. Dodenhoff, 254 S.C. 407, 414, 175 S.E.2d 792, 795 (1970).

110. 83 S.D. 57, 154 N.W.2d 803 (1967).

111. *Id.* at 68, 154 N.W.2d at 809; *see also* Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (built in a workmanlike manner and is suitable for habitation); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (reasonable workmanship and habitability).

112. *Waggoner*, 83 S.D. at 64, 154 N.W.2d at 807; *see generally* 17 AM. JUR. 2D *Contracts* § 371 (1964 & Supp. 1990).

Finally in 1985, the Texas Supreme Court directly addressed this issue. In *Evans v. J. Stiles, Inc.*[113] disgruntled home owners sued under both theories, alleging the use of faulty brick on the home. A jury found that the home was not constructed in a good and workmanlike manner, but refused to find it uninhabitable. The court held that the implied warranty of construction in a good workmanlike manner is independent of the implied warranty of habitability.[114]

The development of separate implied warranty theories has proved cumbersome in South Carolina. Prior to *Kennedy*, courts tended to recognize only a general implied warranty theory, typically with an emphasis on the concept of habitability. One explanation for this history may be a lack of appellate cases with facts similar to those in *Evans*—a habitable home with unworkmanlike construction.

Interestingly, the origin of an implied warranty of workmanlike service in South Carolina predates the *Rutledge* opinion by nineteen years. In *Hill v. Polar Pantries*[115] the court found that "where 'a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship . . . .' "[116] *Polar Pantries* involved the planning and installation of a frozen-food-locker plant. The defendant, owner of similar plants, contracted to design and oversee the installation of plaintiff's plant. Subsequent cracking of the floors and walls gave rise to the suit.

Aside from *Rutledge*, South Carolina courts did not discuss this theory of implied warranty again until *Carolina Winds Owners' Association v. Joe Harden Builder, Inc.*[117] In *Carolina Winds* the court of appeals rejected the plaintiff's implied warranty of habitability and negligence causes of action against the builder and noted other potential remedies. Citing *Polar Pantries*, the court stated that builder contracts contain an implied warranty that the work will be performed in a careful, diligent, workmanlike manner. The court continued:

> If the construction turns out to be defective by reason of the builder's unworkmanlike performance, the breach of warranty gives the injured party, i.e., the person who contracted to have construction work done, a claim for damages for loss of his expectancy. This is a liability arising from the construction contract to which the builder is a party, not some subsequent contract of sale to which he is a stranger.[118]

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113. 689 S.W.2d 399 (Tex. 1985).
114. *Id.* at 400.
115. 219 S.C. 263, 64 S.E.2d 885 (1951).
116. *Id.* at 271, 64 S.E.2d at 888 (quoting 17 C.J.S. *Contracts* § 329 (1963)).
117. 297 S.C. 74, 374 S.E.2d 897 (Ct. App. 1988).
118. *Id.* at 84, 374 S.E.2d at 903.

Although it limited the concept by the doctrine of privity, this court apparently recognized a separate, implied warranty of workmanlike service. However, this warranty would only benefit a new home purchaser who contracted directly with the builder. An implied warranty of habitability is therefore the only warranty available to the majority of new home purchasers.

This privity limitation apparently led the *Kennedy* court to address the issue. "The practical difficulties facing today's new home buyer mandate that we allow a buyer to ordinarily proceed against both the builder and seller, or either of them."[119] Similar to its handling of the negligence issue, the court expanded the implied warranty principles to afford new home purchasers greater protection. Although this portion of the opinion is dicta, the court's unanimity greatly increases the opinion's usefulness as a guide.

Referring to *Carolina Winds*, the *Kennedy* court stated that workmanlike performance is an "implied warranty of workmanlike service, and is distinct from the implied warranty of habitability."[120] The court then rejected any requirement of privity and overruled *Carolina Winds* to the extent that it recognized such a requirement. Finally, the court held that "[a]n implied warranty of service attaches to a builder's construction of new residential housing. A home buyer purchasing from a party not the builder may ordinarily sue the builder on this warranty despite the lack of contractual privity."[121]

Although courts have begun to recognize a separate warranty of service, few have elaborated on its character. One court described workmanlike as that "quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[122] This language indicates that a warranty of service is in some respects similar to the requirement of reasonable care under negligence theory.[123] The standard, therefore, appears to be one not of perfection, but of reasonableness.[124]

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119. 299 S.C. at 344, 384 S.E.2d at 736.

120. *Id.*

121. *Id.* at 347, 384 S.E.2d at 737.

122. Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987).

123. *Id.*; *see also* Hubbard & Felix, *supra* note 4, at 569; 17 AM. JUR. 2D *Contracts* § 372 (1964 & Supp. 1990).

124. *See* Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 41, 470 P.2d 593, 598 (1970) (standard of workmen of average skill and intelligence).

2. *Lender*

The application to builders of the warranty of workmanlike construction is apparent. A less obvious possibility to consider, however, is its effect on lenders. The application of this warranty to repairmen and other service providers supports this possibility.[125] Although at least one court has rejected the application of this warranty to professionals, that opinion is suspect in light of *Melody Home Manufacturing Co. v. Barnes*.[126] Lenders should at least be aware of this implied warranty and the potential for liability.

V. CONCLUSION

Because of the continuing trend toward *caveat venditor*, builders, vendors, and lenders should be increasingly cautious in transactions concerning the sale of new homes. The implied warranties of habitability and workmanlike service pose the greatest potential for liability. Although the implied warranty of habitability theory is well defined, the concept of the implied warranty of workmanlike service is still in the formative stage.

Kennedy insulates "mere lenders" from most liability, while simultaneously exposing builder-vendors to greater liability. Consequently, these parties no longer can rely on legal doctrines such as privity and the economic loss rule for protection. The *Kennedy* decision clarifies the law of liability for construction defects in South Carolina and provides a timely warning to those involved in the construction of new homes in South Carolina.

Richard C. Webb

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125. *See Melody Home Mfg. Co.*, 741 S.W.2d at 349. *But see* Arvida Corp. v. A.J. Indus., Inc., 370 So. 2d 809 (Fla Dist. Ct. App. 1979) (implied warranties are limited to sales of goods).

126. 741 S.W.2d 349 (Tex. 1987). *Compare* Dennis v. Allison, 698 S.W.2d 94 (Tex. 1985) (implied warranty unnecessary for psychiatrist services) *with Melody Home Mfg. Co.*, 741 S.W.2d at 349 (drafter of *Melody* joined in dissenting opinion in *Dennis*).